

### **REMARKS**

Applicants have received and carefully reviewed the Office Action mailed February 20, 2009. Claims 71, 74-86 and 99-111 have been canceled and claims 56, 62, 65, 70, 87, 91, and 93 have been amended. Support for the amendments is found in the specification, claims, and drawings as originally filed. No new matter has been added. Reconsideration and allowance of the pending claims are respectfully requested.

### **Interview Summary**

Applicants thank the Examiner for the personal interview with their representatives on June 2, 2009. The Examiner's Interview Summary, mailed June 5, 2009, contains an adequate description of the substance of the interview.

### **Inventorship and Corrected Filing Receipt**

A request to correct inventorship under 37 C.F.R. §1.48(c) was filed on January 19, 2006. With that filing, Applicants additionally requested the issuance of a corrected filing receipt reflecting the change of inventorship. Applicants have not yet received an indication that the inventorship has been corrected, and have not yet received a corrected filing receipt reflecting the change of inventorship. Applicants respectfully request that these be issued in due course.

### **Rejection under 35 U.S.C. § 102(b)**

Claims 56-73 and 87-106 are rejected as being anticipated by Kogasaka et al. (EP 0807415A2). Applicants respectfully traverse the rejection. Independent claim 56, as amended, recites:

56. (Currently Amended) A method for retracting tissue adjacent a spinal location, comprising:  
making an incision in a patient over a spinal surgical location;  
inserting a retractor into the incision in the patient;  
advancing the retractor to a position adjacent the spinal location, the retractor having a proximal end and a distal end and defining an access path therethrough, the distal end being positioned adjacent the spinal location and the proximal end extending through the incision and outside of the patient;  
expanding at least a portion of the retractor adjacent the spinal location by moving a plurality of discrete segments of the retractor away from each other to

retract tissue adjacent the spinal location, wherein the discrete segments at least partially surround said access path in the expanded configuration; and  
performing a surgical procedure on the spine, wherein the surgical procedure is performed through the retractor.

Kogasaka et al. do not appear to teach the identical claimed method steps, as is required for anticipation. The Examiner refers to the embodiment shown in FIGS. 110-112 of Kogasaka et al. as anticipating the claimed method. Kogasaka et al. appear to teach a surgical stripper device and method of using it to strip tissues from a body cavity or area. Kogasaka et al. teach:

As the folded part 446 moves towards the base, the interstices between slits 448 increasingly widen until the elastic member 444 is expanded in a radial direction, to become spherical, which makes blunt stripping possible as shown in Figs. 111B and 112B.

Water feed/suction takes place through slits 448 and the mesh 443 under the control of the channel open/closure buttons 406 and 407.

After stripping is completed, the handling segment 449 is pushed in to the original position, and then the original state is resumed. Then, the insert 441 can be easily withdrawn from the trocar not illustrated here.

See column 70, lines 22-33 and Fig. 111B. Kogasaka et al. do not appear to teach expanding a retractor to retract tissues, but rather appear to teach a stripper insert that provides fluid feed and suction for stripping or removing tissues. These steps are not identical. Further, Kogasaka et al. do not appear to teach performing a surgical procedure on the spine, where the surgical procedure is performed through the retractor, as is recited in claim 56. Additionally, there is no motivation for one of ordinary skill in the art to modify Kogasaka et al. to use the tissue stripper in some way to perform a surgical procedure through the stripper on the spine.

Independent claim 65, as amended, recites:

65. (Currently Amended) A method for retracting tissue adjacent a spinal location, comprising:  
making an incision in a patient over a spinal location;  
inserting a retractor into the incision;  
positioning the retractor in the patient adjacent the spinal location, the retractor having a proximal portion and a distal portion;  
pivoting the distal portion relative to the proximal portion; and  
expanding at least a portion of the distal portion adjacent the spinal location by moving a plurality of discrete segments of the retractor away from each other to retract tissue adjacent the spinal location; wherein overlap exists between discrete segments in an unexpanded and an expanded configuration, and

wherein expanding at least a portion of the retractor comprises reducing overlap between adjacent discrete segments.

Kogasaka et al. do not appear to teach such specific method steps or a device capable of performing the steps. Kogasaka et al. teach:

Although in this embodiment the elastic member 444 in the form of a cylinder has slits on its perimeter, the elastic member 444 may be composed of a plurality of strips which are then arranged into a cylinder.

See column 70, lines 39-43. The device of Kogasaka et al. does not appear to have a plurality of discrete segments overlap in an unexpanded and an expanded configuration, as recited in claim 65. Further, the claimed method steps are not inherent because Kogasaka et al. do not appear to teach a structure capable of performing the recited method steps.

Regarding independent claim 87, the Examiner asserts that a notch, by definition, can be broadly understood as a step or degree of expanding of discrete segments 444. The Examiner also asserts that spring member 444 and mesh 443 expand step by step when handling rod 447 is pulled proximally, and each "pulling step" defines a notch as recited in the claims. Applicants respectfully disagree. The Examiner's interpretation of "notches" as merely step of expansion is inconsistent with the specification and inconsistent with the interpretation of one of ordinary skill in the art. Further, Kogasaka et al. do not appear to teach a retractor having a guiding mechanism including a slot with notches extending transverse to a direction in which the slot extends, as recited in claim 87. Kogasaka et al. thus do not appear to teach or suggest a device having a structure such that it would be capable of performing the steps recited in the claims. Further, there is no motivation for one of ordinary skill in the art to modify Kogasaka et al. to achieve the specific method steps recited in the claims.

**Conclusion**

Reconsideration and reexamination are respectfully requested. It is submitted that, in light of the above remarks, all pending claims are now in condition for allowance. If a telephone interview would be of assistance, please contact the undersigned attorney.

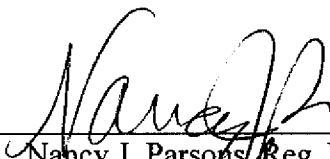
Respectfully submitted,

GENE P. DIPOTO et al.

By their Attorney,

Date: \_\_\_\_\_

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